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**Supreme Court of the United States**

OCTOBER TERM, 1942

No. 554

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE  
WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON  
TELEPHONE MANUFACTURING COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA and the FEDERAL  
COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,

Intervenor.

No. 555

COLUMBIA BROADCASTING SYSTEM, INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS  
COMMISSION and MUTUAL BROADCASTING SYSTEM, INC.,  
Respondents.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK

**MOTION OF THE AMERICAN ASSOCIATION OF  
ADVERTISING AGENCIES FOR LEAVE TO  
FILE BRIEF AS AMICUS CURIAE, AND BRIEF  
OF AMICUS CURIAE**

GEORGE LINK, JR.,

Counsel for American Association  
of Advertising Agencies  
as Amicus Curiae.

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May it Please the Court:

The undersigned, as counsel for the American Association of Advertising Agencies, respectfully moves this Honorable Court for leave to file the accompanying brief in these cases as *amicus curiae*.

GEORGE LINK, JR.,

Counsel for American Association  
of Advertising Agencies  
as *Amicus Curiae*.

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BRIEF OF AMERICAN ASSOCIATION OF ADVERTISING  
AGENCIES, AS AMICUS CURIAE

## Preliminary Statement

This brief is submitted on behalf of the American Association of Advertising Agencies, as *amicus curiae*.

This brief is filed with the written consent of the attorneys for all of the parties in this action.

The American Association of Advertising Agencies is an unincorporated non-profit association of advertising agencies, and their national organization. The word "agencies" does not accurately describe the activities of the members of the industry. Advertising agencies are more accurately described as advertising practitioners. They are retained by advertisers by reason of their accumulated knowledge of the artistry and technique of modern scientific advertising. In and of themselves they are large and substantial creative organizations with payrolls larger, in many instances, than those of their clients. The advertising practitioner has learned how the average person will react to various advertising appeals and techniques. This technique and artistry have been acquired by wide practical experience, through trial and error, scientific research, etc., at high cost. Advertisers now require the services of these advertising practitioners to counsel them in their advertising and marketing problems. The advertising practitioner originates and creates advertising plans for the advertiser. The advertising practitioner prepares the message. The advertising practitioner selects the media best adapted to the appeal to be made on a mass scale to the public. The advertising practitioner purchases the advertising space required from newspapers, magazines, and billboards and purchases the necessary time on radio stations and networks. Advertising practitioners prepare or aid in the preparation of broadcasting programs, including the preparation of the script, the hiring of the talent, the casting of the talent, the training of the talent and the rehearsal of the talent. In its purchase of time the advertising practitioner is financially responsible for the radio time used by its clients.

The principal object of the American Association of Advertising Agencies is to improve the practice of advertising by raising its ethical standards, by developing, through research, better technical and scientific methods of advertising, by the accurate appraisal of media circulation, readership and listening habits of the public and, broadly, by finding ways of better serving the enlightened self-interest of the consumer.

As between the advertising media, to wit: newspapers, magazines, billboards and radio, the American Association of Advertising Agencies is impartial. Its policy is to promote free and open competition between all such media, both vertically and horizontally.

## ARGUMENT

### POINT I

**The Supreme Court should take judicial notice of the social and economic effect of the Federal Communications Commission's order of October 11, 1941, particularly Section 3.104.**

The revenue which the networks and stations receive from commercial broadcasting has made the American system of broadcasting possible. This is stated again and again throughout the Federal Communications Commission's report. Currently, the clients of the advertising practitioners spend in excess of one hundred million dollars per year in commercial broadcasting. Currently, a part of the broadcast time is given by the clients of the advertising practitioners to the Government for the purpose of marshalling public opinion and public effort toward the successful prosecution of the war. Not only is the radio time given for this purpose, but also in many instances, the talent. The Treasury Department has recognized this contribution in tax rulings made by it.



By way of illustration the following are quoted from releases by the Bureau of Internal Revenue, dated September 29, 1942 and November 10, 1942 respectively:

"Reasonable expenses incurred by companies in advertising and advertising technique to speed the war effort among their own employees, and to cut down accidents and unnecessary absences and inefficiency, will be allowed as deductions. Also reasonable expenditures for advertisements including the promotion of Government objectives in wartime, such as conservation, salvage or the sale of War Bonds, which are signed by the advertiser, will be deductible provided they are reasonable and are not made in an attempt to avoid proper taxation."

"Amounts paid by airplane corporations for advertisements which do not advertise the product of any one company but whose purposes are to stimulate enlistment in the Air Corps, to stimulate bond buying, to aid the scrap campaign, and to increase the efficiency of labor are deductible under Code Sec. 23 (q) as amended by the 1942 Act."

It is essential in the opinion of advertising practitioners that the networks be placed upon a competitive level with newspapers, magazines and billboards in the race for the advertisers' dollar. The advertising practitioner in cooperation with its client, starts preparing for a proposed advertising campaign 12, 6 or 3 months prior to the release or commencement thereof. One of the important elements in the preparation thereof is deciding upon the type of media to be used, whether newspapers, magazines, billboards, and radio or one or more of them or a combination of all of them. Newspapers, magazines, and billboards are in most instances immediately purchasable for use as and when needed. Advertising space purchased or to be purchased from newspapers, magazines or billboards is elastic. It can be expanded or reduced to meet the advertising practitioner's client's need. In broad-

casting, time and facilities are limiting factors, to wit: (1) 24 hours a day, (2) available wave lengths. Pages in newspapers and magazines are not exclusive of one another. That is, various advertisements can appear on the same page at the same time in the same publication. In broadcasting, in a specified locality, definite time and wave lengths must be exclusively assigned to one advertiser. It is essential to the needs of advertising practitioners, and of all their clients, that there be no reduction in the number of radio stations which are now available outlets for the national advertiser in each community, and that there be no impairment of the present availability of these stations for the needs of the national advertiser of these stations.

Section 3.104 of the Commission's order reads as follows:

"Section 3.104. No license shall be granted to a standard broadcast station which options for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m.; 11 p. m. to 8 a. m. Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations."

"This places the networks at a serious competitive disadvantage. By way of illustration: an advertising practitioner in preparing advertising plans for a client, must usually spend months of study and research in preparing tentative broadcasting programs and must negotiate with talent, writers and for time, etc. The negotiations with reference to network broadcasting are dependent upon the ability of the network to deliver certain stations. The net-



work must be in a position to inform the advertising practitioner and the advertising practitioner its client, in advance of commitment, what stations and what hours the network can deliver. The advertising practitioner is desirous of purchasing listener circulation for its client. Network audience comes into competition with the assured reader circulation of newspapers and magazines. No advertising practitioner would recommend to its client the purchase of network time without some assurance of circulation outlet. Circulation assurance in network broadcasting means dependable delivery of stations offered for utilization.

No station under the proposed order could agree in advance to make any time available when and if ordered on behalf of a network advertiser. The amount which the advertising practitioner spends for radio talent is substantial. Competent radio talent is scarce. Outstanding radio talent always negotiates on a seller's market. The advertising practitioner would not risk making financial commitments to talent without definite assurance of station delivery. Many of the talent contracts specify the network station coverage. Any change in a network coverage, that is, the omission of an important station in a network, may give to the talent, the desire and right of contract termination. No comparable condition prevails among the competitors of broadcasting. In most instances, space and circulation can be purchased in any quantity for firm delivery. In broadcasting, under the proposed order, no assurances of any kind can be given the advertising practitioner as to the time and stations available within a reasonable negotiating period, giving due consideration to all of the elements which go into the making of a commercial broadcasting program, to wit: script writers and dramatic talent to be hired, music talent to be engaged, rehearsals to be held, consents to use copyrighted literary works to be secured, etc.

It places the purchase of commercial broadcasting from the listener circulation standpoint on a "what is left" basis, rather than on an assured in advance basis such as is sold by the competitors of network broadcasting.

There is nothing in the language of the Federal Communications Act which indicates that Congress intended to place or to give the Commission power to place such a restraining hand upon commercial broadcasting. The advertising practitioners and their clients believe the maintenance of vigorous competition among the networks is in the public interest. The advertising practitioners fear that the effect of the Commission's order will be the extinction of this vigorous competition by the order's tendency to promote a network of the strongest individual stations, leaving the weaker stations without adequate financial support. The growth of networks up to the present time has been based upon program popularity, which has developed the audience of their affiliated stations. Program popularity has had the tendency to build up the strong and weak stations alike, and thus to build up the network as a whole. The breaking down of a network composed of strong and weak stations is not, in the opinion of advertising practitioners, in the best interests of broadcasting. At the present time there is keen competition among the four networks. Each network today is composed of some outstandingly strong stations, plus a group of weaker stations. Today an advertising practitioner is offered, on behalf of its client, network facilities as an integrated unit. Thus the stronger stations carry the weaker stations of the network by the network transmitting to the weaker stations the same powerful audience building programs available to the stronger stations. Under the rules of the Commission this station team-work could be easily disrupted. An advertising practitioner, or its client, or any other party in control of top ranking programs, could set up a network comprised of the stronger stations in each locality. All

that would be required is to link two or more stations by wire. Such a network, by spending substantial sums in program production, could produce additional programs having greater than average audience appeal and thus take away the listeners from the weaker stations. Thus this network, comprising the strongest stations in each locality, would command the most desirable commercial broadcasting business, to the injury—in financial returns and listening audience—of the weaker stations. The result would be that all but the strongest stations would become more and more undesirable for use by advertising practitioners whose clients are national advertisers. The effect upon network broadcasting would probably be that instead of having four national networks, now actively competing among themselves, with the best audience building programs, there would be one all-powerful network confined to a single group of the strongest stations of the country. The weakening of the present networks, through the loss of influential stations, and of top ranking programs, would lessen their ability to serve the smaller stations with audience building programs. A vicious circle might thus be developed injurious to the great bulk of advertising practitioners, advertisers and weaker stations. The super-station network thus created would become indispensable to nationwide broadcasting and would be in a powerfully entrenched monopolistic position, contrary to the "public convenience, interest or necessity."

## POINT II

**Should such an order, particularly Section 3.104, be issued without specific notice to commercial users of broadcasting time?**

Throughout the Federal Communications Commission's report it is conceded that network broadcasting and station broadcasting are financially dependent upon the income derived from commercial users of broadcasting.

The order instituting the investigation is dated March 18, 1938 and the concluding paragraph reads as follows:

"It is further ordered, that a copy of this order be posted in the office of the Secretary and that a copy of the same be mailed to each licensee of a broadcast station and to each chain and network organization."

No specific order was made directing that notice be given to the commercial users of broadcasting, those most vitally interested in any change affecting the ability of the networks to meet their broadcasting needs—those users who make the continuance of the American system of broadcasting possible by providing the funds that support it. No testimony, as far as we have been able to discover, was given by these interests.

It may be that if the Commission had secured the testimony of the principal commercial users of broadcasting the majority would have come to a conclusion other than that set forth in their opinion.

It is not an answer that the networks stated fairly, and to the best of their belief to the Committee, the requirements, in part or in whole, of the commercial users of broadcasting. We cannot assume the same presentation would have been made by the advertising practitioners if they had had notice of the proposed action, but even so, the same facts coming directly from the tongues of the commercial

users of broadcasting would have been more authoritative and may have been more convincing. In any event no one can say with definiteness that the views of the majority of the members of the Commission would not have been affected by their testimony.

Nor is it an answer that advertising practitioners should have been alert and watched the proceedings before the Commission. There was nothing in the order appointing the investigating committee which indicated in any way that the commercial users of broadcasting would be seriously affected by the order. In fact there was no intimation in any of the public notices that any such order would be issued.

The object of the Commission, to wit, to provide freedom and equality of opportunity to all stations, is laudable, and has the endorsement of all advertising practitioners. But in the public interest it seems to the advertising practitioner that the commercial users should have been notified of the proposed rule and have been specifically invited to attend and give testimony.

Proceedings under statutes, affecting so materially the commercial users of broadcasting, and the social and economic life of the listeners, should provide for specific notice to those so affected. Due process of law implies that a Commission invested with the powers claimed by the Federal Communications Commission should issue orders of the kind hereinbefore referred to only after notifying those directly involved that they are to be affected by the proposed proceeding and invited to give testimony and to be heard. The notice should not be indirect. It should clearly state the object sought to be accomplished and the restrictions which it is contemplated the Commission will place upon the activities of those vitally affected by the proposed order.

**Conclusion**

It is of the utmost importance to the commercial users of broadcasting that the powers of the Federal Communications Commission be clarified, particularly as to whether the order set forth in this brief adversely affects public interest, convenience or necessity. We believe they should be clarified by the Trial Court after hearing the testimony of all those having a major interest in broadcasting, and it is for this reason that we join in that part of the appellants' prayer for relief asking that the issues raised by the complaint be tried.

Respectfully submitted,

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